Petition

81-615

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NO. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term 1981

PAUL F. GRAY, JR.

Petitioner

vs.

UNITED STATES OF AMERICA,

Respondent

ON WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI

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PETITION FOR CERTIORARI

Petitioner prays that a Writ of Certiorari issue to review the Order and Decision of the United States Court of Appeals for the Sixth

Circuit entered on July 16, 1981 which affirmed the conviction of petitioner for attempting to evade and defeat income taxes for the years 1968, 1969 and 1970 in violation of Section 7201 of the Internal Revenue Code.

Petitioner claims as fundamental error the Order of the Sixth Circuit Court of Appeals which found without merit the argument of Petitioner that the District Court was in error in denying the Motion for Writ of Error Corum Nobis to Vacate and Set Aside His Conviction and to Permit Him to Withdraw His Pleas of Guilty.

If the Sixth Circuit Court of Appeals had recognized the merit of Petitioner's claim as set forth above, it would have reversed the judgment of the District Court and remanded the cause for an evidentiary hearing upon Petitioner's motion.

QUESTION PRESENTED FOR REVIEW

The Order, Judgment, and Decision of the United States Court of Appeals for the Sixth Circuit, dated July 16, 1981, from which Certiorari is sought herein, affirmed the Judgment of the United States District Court for the Eastern District of Tennessee.

The question presented in this petition is:

Did the Court of Appeals for the Sixth Circuit err in affirming the District Court's denial without a hearing of Petitioner's motion to vacate and set aside his conviction for attempted income tax evasion and to permit him to withdraw the guilty pleas upon which the conviction was based?

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The opinion of the United States Court of Appeals for the Sixth Circuit, dated July 16, 1981, which affirmed the denial of the Motion for Writ of Error Corum Nobis is attached. Appendix, page 33.

The opinion of the United States District Court for the Eastern District of Tennessee, Northeastern Division, dated November 10, 1980 which denied the Motion for Writ of Error Corum Nobis is attached. Appendix, page 37.

JURISDICTION

The Order of the United States Court of Appeals for the Sixth Circuit, from which Certiorari is sought, was dated and entered on July 16, 1981.

Jurisdiction of the Supreme Court of the United States is invoked under Title

28, U.S.C., Section 2101, and Rule 17(c) of the Supreme Court Rules.

CONSTITUTIONAL PROVISION

United States Constitution

Amendment XIV.-Citizenship; Privileges and Immunities; Due Process; Equal Protection; Appointment of Representation; Disqualification of Officers; Public Debt; Enforcement

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

In 1975 the Petitioner was indicted in the United States District Court for the Eastern District of Tennessee for attempting to evade and defeat income taxes by willfully

and knowingly filing false and fraudulent income tax returns for himself and his wife for the years 1968, 1969 and 1970 in violation of Section 7201 of the Internal Revenue Code (26 U.S.C., §7201). Appendix, page 33 . At his arraignment, the Petitioner entered a plea of not guilty to each count.

At a later date, the Petitioner again appeared with counsel and it was announced to the Court by counsel for the United States that a plea bargain had been arrived at under which, if acceptable to the Court:

(a) The Petitioner would withdraw his plea of not guilty and enter a plea of guilty to each of the three counts.

(b) A judgment of conviction would thereupon be entered as to each count.

(c) The Petitioner would be sentenced to a term of imprisonment in the custody of the Attorney General for a period of eighteen months on Count I. However, the execution of all of this sentence would be suspended except for 100 days which would be served

in a jail type institution. The Petitioner would pay a fine of $2,000.00 with respect to each count making a total of $6,000.00. The Petitioner would be placed on probation for a period of two years following the term of imprisonment. Appendix, page

During the discussion in open court of the above plea bargain arrangement the United States Attorney announced to the Court the following:

> "I should have stated for the Court's elucidation that Mr. Gray [petitioner] should have been advised through his attorneys, and I am sure he has likewise, that the matters that we are attempting to reach a disposition of is the criminal case alone, it makes no disposition of the civil tax liability of Mr. Gray and he should understand that." Appendix, page 42 .

The Petitioner was thereupon rearraigned and entered a plea of guilty to each count subject to the approval of the plea bargain by the Court. The Court thereafter advised counsel that the aforesaid plea bargain

was approved and the guilty pleas were accepted. Several weeks later, the Petitioner again appeared with counsel and a judgment of conviction was entered on all counts and he was sentenced in accordance with the plea bargain. The Petitioner fulfilled his part of the plea bargain by serving the 100 days, paying the $6,000.00 in fine, and complying with the terms of probation.

In 1976, the Commissioner of Internal Revenue issued a deficiency notice which asserted, among other things, that the Petitioner was liable under Section 6653(b) of the Internal Revenue Code for an additional $51,174.23 in civil fraud penalties. The Petitioner filed a petition in the United States Tax Court (Docket #6128-76) in which he sought, among other things, to have that Court review his liability for those penalties. However, in the Tax Court proceeding, the United States through its agent, the Commissioner of Internal Revenue, moved for partial summary judgment

with respect to said penalties by asserting that the petitioner was collaterally estopped from denying his liability for the penalties because of his guilty pleas. The Tax Court granted this motion for partial summary judgment and in so doing held that the Petitioner was collaterally estopped from denying that he was liable for the fraud penalties.

In 1980 the Petitioner filed a Motion for Writ of Error Corum Nobis in the District Court seeking to have his conviction vacated and to be permitted to withdraw his guilty pleas. The District Court denied that motion without a hearing and Petitioner appealed to the United States Court of Appeals for the Sixth Circuit.

The Sixth Circuit Court of Appeals held that the Petitioner's assignment of error was without merit and affirmed the decision of the District Court. Said court stated that it was not necessary that the Petitioner

be advised of the civil ramifications of his guilty plea and that the evidence did not show that the Petitioner had been misled with respect to his civil liability. The Sixth Circuit decision was filed on July 16, 1981.

ARGUMENT

During the criminal case the Petitioner was never advised by his counsel, by counsel for the United States, or by the Court that his guilty pleas would later estop him from denying that he was liable for the 50% fraud penalty provided by Section 6653(b) of the Internal Revenue Code or any other liability to the United States. In fact, on the contrary, he was advised by the United States Attorney, indirectly through his counsel and directly in open court, that his pleas would dispose of the criminal case alone and would make "no disposition of the civil tax liability."

Petitioner alleges that the United States breached the plea bargain and violated his constitutional rights in that said breach would deprive him of property without due process because his liability for the civil penalty has never been litigated.

The Petitioner further avers that at the time the guilty pleas were entered that he believed and still believes that he was innocent of the charges made in the indictment. He entered said pleas, however, because he was advised by counsel that if he persisted in the trial on the matter, he would not only incur substantial additional attorney fees but he would (a) run a risk of being convicted on all three counts and (b) if so convicted, he could receive a total sentence of up to 15 years, a total fine of up to $30,000.00, be required to pay the cost of his prosecution, and have no choice or control over where he would serve any sentence received. However,

he was advised by counsel that if he accepted the plea bargain and pleaded guilty he would have to serve only 100 days, pay a fine of only $6,000.00, pay no cost, and could serve the 100 days in a county jail in East Tennessee. The last item, being able to serve the sentence in East Tennessee, was of particular importance to the petitioner because it would permit him during his incarceration to remain near and consult with (a) the person in charge of his four minor children who lived with him and for whom he was responsible under a decree of divorce and (b) the employees in charge of his five businesses i.e. two night clubs, a cab company, an aviation company, and a limousine company. Therefore, petitioner entered into the plea bargain even though he believed himself innocent in order to (1) avoid the expense of defending himself, (2) avoid the risk of being convicted and having to serve a substantially greater sentence and to pay substantially

greater fines plus the cost of his prosecution and (3) be able to serve a sentence at some institution located at such a distance that he could maintain contact with his children and his businesses.

Petitioner entered into the agreement with the understanding that, on his part, he would entail only a sentence of 100 days and fines totaling $6,000.00 and that he would have his civil liabilties adjudicated at a later date. He had no understanding that his plea would automatically result in him owing another $51,000.00 in penalties without any chance of contesting such penalties in any court. Indeed, the United States Attorney specifically stated at the time of his arraignment that Petitioner's criminal pleas would make "no disposition of the civil tax liability."

Until 1964 it was a generally accepted principal that the doctrine of collateral estoppel was not applicable between a

conviction in a criminal case and a later civil case between the same parties arising out of the same set of facts. United States v. Glidden Company, 119 F. 2d 235 (6th Cir. 1941), cert. denied 314 U.S. 678 (1941). The weight of authority even today seems to be in favor of the same general principal. See Conviction or Acquittal as Evidence of Facts on Which it was Based, in a Civil Action, 18 A.L.R. 2d 1287, pps. 1307 et seq., where no less than 29 state jurisdictions and some federal cases are cited as holding that a guilty plea is not conclusive and can be explained and rebutted by the defendant in a later civil suit. The same principal appears in Rule 36(b) of the Federal Rules of Civil Procedure and in Rule 90(e) of the Tax Court's own rules. It also appears in Section 68(i) of the Restatement of Judgments. Appendix, page 53.

However, in 1964 the Tax Court reversed its earlier decision and departed from the generally accepted principle by holding that the doctrine of collateral estoppel is

applicable as between a conviction in a criminal tax case and a later civil tax case arising out of the same facts. Amos v. Commissioner, 43 T.C. 50 (1964), aff'd, 360 F. 2d 358 (4th Cir. 1965); Arctic Ice Cream Company v. Commissioner,43 T.C. 68 (1964). In Amos, the taxpayer was convicted after a trial in the District Court of attempted evasion under Section 7201 and the Tax Court held that this conviction estopped him from late denying that he was liable for the civil fraud penalty under Section 6653(b). In Arctic Ice Cream Company, the Tax Court held that under the corresponding sections of the 1939 Code, a corporation which pleaded guilty to attempted evasion was estopped from denying liability for the civil fraud penalty. There were strong dissents in both Amos and Arctic Ice Cream Company. Judge Withey stated quite emphatically:

> "In my view the majority has here adopted as a rule of law a principle which has the effect of depriving any taxpayer who has been

convicted under Section 7201 of the 1954 Code, either by a jury or by a judge setting without a jury, of his constitutional right to due process before being deprived of his property." Amos, supra.

Judge Withey continues in his dissent by explaining the fundamental difference between the criminal case and a civil case in a tax matter:

"In civil tax fraud cases a deficiency must be found before a fraud penalty may attach inasmuch as to support the penalty there must be a prior determination that a part of a deficiency was due to fraud, while under the criminal code, sec. 7201, a deficiency need not be first determined in order that the defendant be convicted. In the civil action before this Court it well might be found that the deficiency determined by the Commissioner is not correct, that there is no deficiency, yet, under Amos, it would nevertheless be incumbent upon this Court to uphold the asserted fraud penalty because the taxpayer would be collaterally estopped to deny the same due to a prior conviction under the criminal section.

More important from a constitutional standpoint is the difference between the rules of evidence governing the two trials. The criminal trial involves the use of the stricter common law rules

> of evidence under which evidence offered by the taxpayer might be rejected which evidence might well be admissable before the Tax Court in the civil case. . . The result reached by the majority in effect nullifies a specific right to judicial review which Congress has extended to taxpayers. . . By the enactment of sections 6653(b) and 7201 of the Code, Congress has created two separate causes of action, rather than one, and it is my opinion that the taxpayer is entitled to have his day in court as to each cause of action separately." Amos, supra.

The injustice is even more manifest when the doctrine of collateral estoppel is applied after the criminal case is disposed of with a guilty plea, as pointed out by Justice Drennen in his dissent:

> "My disagreement with the conclusion reached in this case, where the issue of fraud has not even been litigated in any court, is more pronounced than my disagreement with the conclusion reached by the majority in John W. Amos, supra, where the issue of criminal fraud was decided after a trial." Arctic Ice Cream Co., supra.

Nevertheless, a majority of the Tax Court has consistently followed these decisions since 1964 but usually with further strong

dissent. Goodwin v. Commissioner, 73 T.C. 215 (1979). Some of the Circuits have adopted the rule usually citing as authority the Tax Court's decision in Amos and Arctic Ice Cream Company. Plunkett v. Commissioner, 465 F.2d 299 (7th Cir. 1972).

In view of the foregoing, it is apparent that since 1964 the United States, through its agent, the Commissioner of Internal Revenue, has repeatedly taken the position in the Tax Court as well as in other federal courts that where a taxpayer pleads guilty to attempted evasion under Section 7201 he automatically and without further action by himself or the Commissioner concedes that he is also liable under Section 6653(b) for the 50% fraud penalty for the same year. In actual practice in a criminal tax case, the taxpayer is not even aware of the amount of the penalty since the understatement used in the criminal case is usually different from the understatement used in the later civil case. In any event, and no matter how great or small

the understatement of tax is finally determined to be, the guilty plea in the criminal case according to Amos conclusively establishes that the taxpayer is liable for a civil fraud penalty equal to 50% of the understated tax.

According to the Commissioner, and since Amos under applicable case law, this is a direct and automatic result of the plea in the criminal case. Obviously, this result works an injustice to the taxpayer when he is not advised in the criminal case of such result by the Court, his counsel, or counsel for the government. This injustice is even more severe when, as happened in Petitioner's case, the taxpayer was advised in open court by the United States Attorney that his guilty plea in no way made a determination of his civil liability. In this case Petitioner and his counsel believed at the time of his guilty plea that the penalty would amount to $6,000.00 and that his civil liabilities would be determined at a later date.

Petitioner did not know and was never advised by his counsel, opposing counsel, or the Court that his guilty plea would automatically result in an additional $51,000.00 penalty which could not be questioned.

In its memorandum opinion the District Court relied upon United States v. Miss Smart Frocks, Inc., 279 F. Supp. 295 (S.D.N.Y. 1968) aff'd sub. nom. United States v. Carlino, 400 F. 2d 56 (2nd Cir. 1968) cert. denied, 394 U.S. 1013. This case in turn relied heavily upon United States v. Parrino, 212 F. 2d 919 (2nd Cir. 1954) cert. denied, 348 U.S. 840 (1954), from which the following was quoted:

> "Doubtless there may frequently arise tax evasion cases in which after conviction on a plea of guilty the defendant is unpleasantly surprised when, confronted with a civil action for the recovery of evaded taxes, he finds a defense foreclosed by his plea in the criminal case. . . We think it plainly unsound to hold. . . that such defendants are subject to manifest injustice, if held to their plea, merely because they do not understand or foresee such collateral consequences. We find no case which even looks in that direction. ."

However, the Parrino case went on to state the following which appears to be particularly pertinent to our case:

> "Generally in criminal cases, the defendant's surprise as to the severity of sentence imposed after a plea of guilty, standing alone, is not such manifest injustice as to require vacation of the judgment and permission to withdraw a plea of guilty. True, when surprise stems from a misunderstanding, reasonably entertained, of remarks by the Judge himself, as in United States v. Lias, 4 Cir. 173 F. 2d 685, or from assurances by the United States Attorney, it may be ground for post-conviction relief.

In Byrnes v. Commissioner, 408 F. 2d 599 (9th Cir. 1969) cert. denied, 395 U.S. 986 (1969), a misunderstanding by the defendant which was based upon a misstatement by the United States Attorney was held to be sufficient grounds for a hearing on the defendant's motion for a writ of error. In United States v. Lias, 173 F. 2d 685 (4th Cir. 1940), a misunderstanding by the defendant which stemmed from remarks made by the Court was held to be sufficient grounds. In United States v. Miss Smart Frocks, Inc., supra, the defendant's misunderstanding of the sentence imposed was not based upon

remarks made by either the counsel for the government or the court.

In order for a guilty plea to be voluntarily made a defendant must be made aware of all direct consequences of his plea. United States v. Wolak, 510 F. 2d 164 (6th Cir. 1975). This principal is also a part of Rule 11 of the Federal Rules of Criminal Procedure which requires a court to inform any defendant of the "consequences of his plea."

Not only was Petitioner not advised of this direct consequence of his plea, he was assured that the entry of his plea would make no disposition of his civil tax liability. To Petitioner, this assurance reasonably meant that the disposition of the criminal case with the guilty pleas would not affect his civil case including civil penalties. The District Court's conclusion that this statement by the United States Attorney "was merely a gratuitous warning that the criminal proceeding did not purport to invclve the separate issue of civil liability" is clearly and manifestly

an erroneous statement in view of the fact that the United States has been successfully asserting for 11 years the entry of a guilty plea in any criminal case under Section 7201 did involve and did dispose of the separate issue of liability for a civil fraud penalty under Section 6653(b). In other words, in Petitioner's case the United States through its agent, the United States Attorney, told the Petitioner in the presence of his counsel and in the presence of the Court that the disposition of the criminal case did not purport to determine Petitioner's liability as to his civil case. However, in the subsequent Tax Court case, the United States through another agent, the Commissioner of Internal Revenue, asserted that the guilty plea in the criminal case automatically and finally disposed of Petitioner's liability for the civil fraud penalty. An automatic assessment of the $51,000.00 penalty in Petitioner's case was a direct and final consequence of his guilty plea. Petitioner asserts that such was a violation of

his constitutional rights in that it denied him his property without due process of law.

Rule 32 of the Federal Rules of Criminal Procedure provides that where necessary to correct a manifest injustice a trial court may set aside a conviction and permit a defendant to withdraw the guilty plea upon which the conviction is based. The trial court continues to have jurisdiction to set aside the conviction and permit the defendant to withdraw his plea even after the sentence is fully satisfied. United States v. Norman, 391 F. 2d 212 (6th Cir. 1968), cert. denied, 390 U.S. 1014 (1968). After the sentence is satisfied, the correct procedure for determining whether or not the defendant has suffered a manifest injustice is that used in this case which is a motion in the form of an application or petition for writ of error corum nobis. United States v. Morgan, 346 U.S. 502 (1954); United States v. Norman, supra. The authority to issue such a writ in a proper case is the All Writs Statute (28 U.S.C., §1651).

United States v. Morgan, supra. Such a motion is also the correct procedure for attacking any conviction involving a legal disadvantage which survives the satisfaction of the actual sentence. Byrnes v. United States, supra; Cariola v. United States, 323 F. 2d 180 (3rd Cir. 1963); United States v. Morgan, supra. Furthermore, such procedure is the correct manner to attack a conviction based upon a guilty plea entered as part of a negotiated plea bargain where, as here, the government fails or refuses to keep its part of the bargain. Holloway v. United States, 393 F. 2d 731 (9th Cir. 1968); Cariola v. United States, supra.

In this case, Petitioner was told in open court by the United States Attorney General that the guilty plea would not have an effect on his civil liability. However, the exact opposite of that statement became the end result in that Petitioner was estopped to even argue about his liability for the

civil fraud penalty. Such a result is a manifest injustice.

Although Petitioner has completed his criminal sentence, the legal disadvantage of the automatic civil fraud penalty survives. In addition, it is clear that the government failed to keep its part of the bargain in this case where a guilty plea was entered directly as a part of a plea bargain.

CONCLUSION

Petitioner requests this Honorable Court to consider the substantial errors in this case which are described briefly as follows:

(1) The doctrine of collateral estoppel as applied from a criminal tax case to a civil tax case where Petitioner was never advised that his criminal conviction would directly result in a civil fraud penalty was a violation of his constitutional right to due process, especially when the issue of fraud was not litigated but was based on a guilty plea after a plea bargain arrangement.

(2) The misleading statement by the United States Attorney to the Petitioner and to the Court that the guilty plea affected only the criminal case and made no disposition of Petitioner's civil tax liability resulted in a manifest injustice to Petitioner when the civil fraud penalty was later assessed without benefit of any review whatsoever.

Therefore, this matter should be reversed and remanded to the District Court with instructions to grant the Petitioner an evidentiary hearing upon his Motion for Writ of Error Corum Nobis.

For all the above reasons, the Petitioner asks this Court to grant Certiorari.

Respectfully submitted,

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Perry Shields
Shields, Rainwater & Humble
Attorneys for Petitioner

CERTIFICATE

I hereby certify that 40 copies of the foregoing Petition for Writ of Certiorari were mailed to the Solicitor-General of the United States of America at the Department of Justice, Washington, D. C. 20530, and three copies were mailed to Tom Dillard, Acting United States Attorney, Eastern District of Tennessee, Second Floor, United States Post Office and Courthouse Building, Knoxville, Tennessee 37901

J. Randolph Humble

APPENDIX

NO. 80-5436

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PAUL F. GRAY, JR.,)

Appellant,)

v.) O R D E R

UNITED STATES OF AMERICA,)

Appellee.)

(Filed July 16, 1981)

Before: JONES, Circuit Judge; CECIL & CELEBREEZE, Senior Circuit Judges.

The defendant-appellant, Paul F. Gray, Jr., was indicted in 1975 for attempting to evade and defeat income taxes for the years 1968, 1969 and 1970 in violation of Sec. 7201 of the Internal Revenue Code. He initially plead not guilty to all counts.

Subsequently the defendant offered to plead guilty to all counts provided the court accepted his pleas and approved a plea bargain which had been worked out with the U.S. Attorney. At the hearing the U.S. Attorney announced "that

the matters we are attempting to reach a disposition of is the criminal case alone, it makes no disposition of the civil tax liability of Mr. Gray and he should understand that". The trial court accepted the pleas and approved the plea bargain. The defendant was sentenced accordingly and has complied with the terms of his sentence.

At a later date, the defendant received a deficiency notice asserting that he owed a fraud penalty under Sec. 6653(b) of the Internal Revenue Code for each of the years covered by the indictment. The defendant petitioned the Tax Court to contest the imposition of the civil fraud penalties. The Tax Court concluded that the defendant was collaterally estopped from denying that he was liable for civil fraud penalties because of his guilty pleas in the criminal matter. The defendant then filed a motion with the trial court to vacate his conviction and to withdraw his guilty pleas. When the district court denied this motion without a hearing the defendant filed this appeal.

A guilty plea must conform to the constitutional standards of voluntariness because it has the effect of a conviction and waiver of

the constitutional right to a jury trial. See Brady v. United States, 397 U.S. 742 (1970). In order for the guilty plea to be voluntarily made the defendant must be made aware of all direct consequences of his plea. Kercheval v. United States, 274 U.S. 220 (1927); United States v. Wolak, 510 F.2d 164 (6th Cir. 1975). This principle was embodied in former Rule 11 of the Federal Rules of Criminal Procedure, which required the courts to inform the defendant of the "consequences of the plea". The courts have consistently construed this to mean that they must inform the defendant of the direct consequences of his plea. Conversely, the courts have held that the defendant need not be advised of the collateral consequences of his plea. Fruchtman v. Kenton, 531 F.2d 946 (9th Cir. 1976), cert. denied, 429 U.S. 895 (1976); Cuthrell v. Director, Patuxent Institution, 475 F.2d 1364 (4th Cir. 1973), cert. denied, 414 U.S. 1005 (1973); United States v. Miss Smart Frocks, 279 F.Supp. 295 (S.D. N.Y. 1968).

Since the collateral estoppel effect of a guilty plea in a subsequent civil tax case consitutes a collateral consequence of the guilty

plea, see United States v. Miss Smart Frocks, supra, it was unnecessary for the district court to have advised the defendant of the civil ramifications of his guilty plea. Nor is there any evidence in the record to indicate that the U.S. Attorney's statement misled the defendant with respect to the separate issue of civil liability.

Accordingly, the decision of the district court is affirmed.

ENTERED BY ORDER OF THE COURT

/s/ JOHN A. HEHMAN

Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TENNESSEE,
SOUTHERN DIVISION

UNITED STATES OF AMERICA	]	
	]	
- vs. -	]	CR-1-75-8
	]	
PAUL F. GRAY, JR.	]	

O R D E R

(Filed November 10, 1980)

This case is before the Court upon the defendant's motion in the form of a petition for a writ of error coram nobis seeking to set aside the judgment of conviction entered herein upon June 17, 1975, on the defendant's pleas of guilty to a three-count indictment charging income tax evasion. The Court having entered a memorandum on the motion, this order is entered in accordance therewith.

It is accordingly ORDERED that the defendant's motion in the form of a writ of error coram nobis be and the same is hereby denied.

ENTER:

/s/ Frank W. Wilson,
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TENNESSEE,
SOUTHERN DIVISION

UNITED STATES OF AMERICA	]	
- vs. -	]	CR-1-75-8
PAUL F. GRAY, JR.	]	

M E M O R A N D U M

(Filed November 10, 1980)

This is a criminal matter in which the defendant, Paul F. Gray, Jr., has filed a motion in the form of a petition for a writ of error coram nobis, 28 U.S.C. Sec. 1651(a), seeking an order vacating and setting aside his judgment of conviction on a three-count indictment for income tax evasion. The matter is before the Court upon the defendant's motion (Court File #19) and a motion on behalf of the United States (Court File #20) to dismiss the defendant's motion on the grounds that its allegations would not entitle the defendant to any relief. Also before the Court are the transcripts of the rearraignment and judgment proceedings held upon May 6 and June 17, 1975, respectively.

A historical review of the case is in order before the Court addresses the merits of the motion. The defendant was indicted in March 1975 under Section 7201 of the Internal Revenue Code, 28 U.S.C. Sec. 7201, on three counts of attempting to evade the payment of federal income taxes due for the years 1968, 1969 and 1970. Following arraignment upon April 9, 1975, at which time the defendant pleaded not guilty to all counts he was rearraigned upon May 6, 1975, at which time he changed his pleas to guilty as to each count. The record reflects that throughout these proceedings the defendant was represented by retained counsel who had secured a plea bargain arrangement with the United States Attorney. The agreement provided for a sentence of 18 months, which would be suspended except for 100 days to be served in a jail type institution, a total of $6,000 in fines and two years' probation to be served consecutive to the 100-day term. The record further indicates that the judgment of conviction was entered in accordance with the United States Attorney's recommendation, that the sentence was served and that the fines were paid. Thereafter upon April

6, 1976, the Commissioner of Internal Revenue sent the defendant a deficiency notice in which the United States asserted that the defendant was civilly liable for the three tax years in question in the sum of $51,174.23. The defendant has resisted the payment of that amount by filing a petition in the United States Tax Court seeking a review of his liability. The Commissioner has apparently moved for partial summary judgment alleging that the defendant is collaterally estopped from denying liabililty due to his guilty pleas in this court. As a result the defendant has now appeared before this Court seeking to withdraw his pleas of guilty and to have his conviction vacated and set aside by means of a writ of error coram nobis.

The writ of error coram nobis is an extraordinary writ. The Court's authority to issue such a writ stems from the All Writs Statute, 28 U.S.C. Sec. 1651(a). Though the jurisdiction of the Court to grant the writ is of limited scope, the writ is sufficient to invoke the Court's jurisdiction to set aside its judgment of conviction even when the sentence has been fully served.

United States v. Norman, 391 F.2d 212 (6th Cir. 1968). However, before coram nobis relief will be granted the record must disclose errors of fact at the trial which are "of such a fundamental kind as to render the proceeding itself irregular or invalid or to require the vacation of the conviction and sentence in order to achieve justice . . ." United States v. Cariola, 323 F.2d 180, 187 (3rd Cir. 1963). There exists a presumption that the proceedings were correct and the burden rests upon the accused to show otherwise. United States v. Morgan, 346 U.S. 502, 512, 74 S.Ct. 247, 98 L.Ed. 248, 257 (1954); see generally ANNOT. 38 A.L.R. Fed. 617 (1978).

The sole basis for the defendant's petition is the contention that the United States through the Commissioner of Internal Revenue has breached the plea bargain agreement between the defendant and the United States Attorney by seeking to recover the amount for which the defendant is civilly liable and using the doctrine of collateral estoppel to preclude the defendant's denial of such civil liability. At the defendant's rearraignment the United States Attorney made the following

statement with respect to any potential future civil tax liability:

> "In addition to that, I should have stated for the Court's elucidation that Mr. Gray should have been advised through his attorneys, and I am sure he has likewise, that the matter that we are attempting to reach a disposition of is the criminal case alone, it makes no disposition of the civil tax liability of Mr. Gray and he should understand that."

P. 10, Transcript of Rearraignment, May 6, 1975. The defendant has asserted that the use of collateral estoppel in the tax court case is an "automatic disposition" of his right to deny civil liability and that such disposition is in violation of the statement that the plea bargain agreement made no disposition of civil tax liability. The Court is of the opinion that the United States Attorney's statement was merely a gratuitous warning that the criminal proceeding did not purport to involve the separate issue of civil liability. It is further the Court's opinion that the defendant's interpretation of the United States Attorney's statement does not merit the issuance of a writ of error coram nobis. See United States v. Miss Smart Frocks, Inc., 279 F.Supp. 295 (S.D.N.Y. 1968).

Accordingly, the motion to dismiss filed on behalf of the United States will be granted.

An appropriate order will enter.

/s/ FRANK W. WILSON

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE

UNITED STATES OF AMERICA	)	
vs.	)	CRIMINAL NO. 1-75-8
PAUL F. GRAY, JR.	)	

MOTION IN THE FORM OF A PETITION BY THE DEFENDANT FOR A WRIT OF ERROR CORAM NOBIS VACATING AND SETTING ASIDE HIS CONVICTION AND PERMITTING HIM TO WITHDRAW HIS PLEAS OF GUILTY

Comes now the defendant and files this motion together with a supporting brief for a writ of error coram nobis vacating and setting aside the judgment of conviction heretofore entered in this matter and permitting him to withdraw his pleas of guilty and in support of said motion, the defendant avers as follows:

(1) On March 26, 1975, the defendant was indicted herein for attempting to evade and defeat income taxes by willfully and knowingly filing false and fraudulent income tax returns for himself and his wife for the years 1968 (Count I), 1969 (Count II), and 1970 (Count III) in violation of Section 7201 of the Internal Revenue Code (26 U.S.C. Section 7201).

(2) On April 9, 1975, he appeared with counsel for arraignment and at that time entered a plea of not guilty to each count.

(3) Subsequently, counsel for the defendant and counsel for the United States with the permission of the Court undertook to negotiate a plea bargain pursuant to Rule 11 of the Federal Rules of Criminal Procedure.

(4) On May 6, 1975, the defendant appeared with counsel and it was announced to the Court by counsel for the United States that a plea bargain had been arrived at under which, if acceptable to the Court, (a) the defendant would withdraw his plea of not guilty and enter a plea of guilty to each of the three counts, (b) a judgment of conviction would thereupon be entered as to each count, (c) the defendant would be sentenced to a term of imprisonment in the custody of the Attorney General for a period of 18 months on Count I but that the execution of all of this sentence would be suspended except for 100 days which would be served in a jail-type institution and the defendant would pay a fine of $2,000.00 with respect to each count and that the defendant

would be placed on probation for a period of two years following the term of imprisonment. At the hearing on May 6, 1975, the United States Attorney also announced "that the matters that we are attempting to reach a disposition of is the criminal case alone, it makes no disposition of the civil tax liability of Mr. Gray and he should understand that".

(5) The defendant was thereupon re-arraigned and entered a plea of guilty to each count subject to the approval of the plea bargain by the Court.

(6) The Court thereafter advised counsel that the aforesaid plea bargain was approved and the guilty pleas were accepted by the Court. On June 17, 1975, the defendant again appeared with counsel and a judgment of conviction was entered on all counts and he was sentenced in accordance with the plea bargain.

(7) Subsequently, the defendant fulfilled his part of the plea bargain by serving the 100 days, paying the $6,000.00 in fines and complying with the terms of probation.

(8) The United States, however, has breached the plea bargain by causing its agent, the Commissioner of Internal Revenue, to issue on April 6, 1976, to the defendant a deficiency notice or 90 day letter in which the United States asserts among other things that he is liable under Section 6653(b) of the Internal Revenue Code for an additional $51,174.23 in penalties. The defendant has filed a petition in the United States Tax Court (Docket No. 6128-76) in which he seeks among other things to have the Court review his liability for the penalties under Section 6653(b) of the Internal Revenue Code but in the Court proceeding the United States through its agent, the Commissioner of Internal Revenue, has moved for partial summary judgment with respect to said penalties asserting that the defendant by reason of his pleas in this matter is collaterally estopped from denying his liability for the penalties. While the defendant's petition is still pending before the Tax Court for the determination of other matters, the Tax Court has indicated that the motion of the United States for partial summary judgment will be allowed.

(9) By breaching the aforesaid plea bargain in the manner set out above, the United States is violating the constitutional rights of the defendant inasmuch as, if permitted to stand, the breach will deprive him of property without due process because his liability for the penalties has never been litigated and, in this matter, the defendant was never advised by his counsel, by counsel for the United States, or by the Court that his guilty pleas would later estop him from denying that he was liable for the 50% fraud penalty provided by Section 6653(b) of the Internal Revenue Code or any other liability to the United States. In fact, on the contrary, he was advised by the United States Attorney indirectly through his counsel and directly by the United States Attorney in open court on May 6, 1975, that his pleas would dispose of the criminal case alone and would make "no disposition of the civil tax liability". The civil liability would include any liability for penalties under Section 6653(b) of the Internal Revenue Code.

(10) The defendant further avers that at the time the guilty pleas were entered the defendant

believed and still believes that he was innocent of the charges made in the indictment, to wit that he had willfully and knowingly filed false and fraudulent income tax returns because he had no knowledge of any errors which appeared in said returns. He entered said pleas, however, because he was advised by counsel that if he persisted in the trial of the matter he would not only incur substantial additional attorney fees but he would (a) run a serious risk of being convicted on all three counts, (b) that if so convicted he could receive a total sentence of up to fifteen years, a total fine of up to $30,000.00, be required to pay the costs of his prosecution, and have no choice or control over where he would serve any sentence received, but (c) that if he accepted the plea bargain and pleaded guilty he would have to serve only 100 days, pay fine of only $6,000.00, pay no costs, and could serve the 100 days in a county jail in East Tennessee. The last item, being able to serve the sentence in East Tennessee, was of particular importance to the defendant because it would permit him during his incarceration to remain near and consult with (a) the persons in

charge of his four minor children who lived with him and for whom he was responsible under a decree of divorce from their mother and (b) the employees in charge of his five businesses, i.e. two night clubs, a cab company, an aviation company, and a limousine company. He, therefore, entered into the plea bargain even though he believed himself innocent of the charges to which he pleaded guilty in order to (1) avoid the expense of defending himself, (2) to avoid the risk of being convicted and having to serve a substantially greater sentence and to pay substantially greater fines plus the costs of his prosecution and also having to serve any sentence at some institution located at such a distance that he would not be able to maintain contact with his children and his businesses. He also entered into the agreement with the understanding that on his part, it would entail only a sentence of 100 days and fines totaling $6,000.00 and would not automatically result in him owing another $51,000.00 in penalties without any chance of contesting such penalties in any court.

WHEREFORE, it is prayed that a hearing be granted on this motion, that thereafter the

judgment of conviction be vacated and set aside, that the defendant be permitted to withdraw his plea of guilty to each count and substitute in lieu thereof a plea of not guilty, and that the defendant be granted such other and further relief as the Court may deem just and proper.

DATED: October 13, 1980

/s/ PS
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CERTIFICATE

It is hereby certified that service of the foregoing Motion In The Form of A Petition By The Defendant For A Writ Of Error Coram Nobis Vacating And Setting Aside His Conviction And Permitting Him To Withdraw His Pleas of Guilty has been made on this 13th day of October, 1980, on counsel for the United States by delivering a copy thereof together with a copy of the supporting brief by hand to the office of Mr. John Cary, United States Attorney, United States Post Office

and Courthouse Building, Knoxville, Tennessee 37901, and by depositing a copy of the motion and a copy of the supporting brief, postage prepaid, in the United States mail addressed to Mr. Benjamin R. Civiletti, United States Attorney General, Department of Justice, Washington, D.C. 20530.

/s/ PS
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STATUTES AND OTHER AUTHORITY

STATUTES

U.S.C. Title 26

Internal Revenue Code

Section 6653. FAILURE TO PAY TAX.

* * *

(b) FRAUD.--If any part of any underpayment (as defined in subsection (c)) of tax required to be shown on a return is due to fraud, there shall be added to the tax an amount equal to 50 percent of the underpayment. In the case of income taxes and gift taxes, this amount shall be in lieu of any amount determined under subsection (a). In the case of a joint return under Section 6013, this subsection shall not apply with respect to the tax of a spouse unless some part of the underpayment is due to the fraud of such spouse.

Internal Revenue Code

Section 7201. ATTEMPT TO EVADE OR DEFEAT TAX.

* * *

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this

title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosectuion.

U.S.C. Title 28

Section 1651. WRITS.

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usuages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge or a court which has jurisdiction.

OTHER AUTHORITY

Federal Rules of Criminal Procedure

Rule 32. SENTENCE AND JUDGMENT.

* * *

(d) Withdrawal of Plea of Guilty. A motion to withdraw a plea of guilty or nolo contendere may be made only before sentence is imposed or imposition of sentence is suspended;

but to correct manifest injustice the Court after sentence may set aside the judgmentIof conviction and permit the defendant to withdraw his plea.

Federal Rules of Civil Procedure

Rule 36. ADMISSION OF FACTS AND OF GENUINENESS OF DOCUMENTS.

* * *

(b) Effect of Admission. Any admission made by a party pursuant to such request is for the purpose of the pending action only and neither constitutes an admission by him for any other purpose nor may be used against him in any other proceeding.

United States Tax Court Rules and Procedures

Rule 90. REQUESTS FOR ADMISSION

* * *

(e) Effect of Admission. Any matter admitted under this Rule is conclusively established unless the Court on motion permits withdrawal or modification of the admission. Subject to any other orders made in the case by the Court, withdrawal or modification may be permitted when the presentation of the merits of the case will be subserved thereby, and the party who obtained the

admission fails to satisfy the Court that the withdrawal or modification will prejudice him in prosecuting his case or defense on the merits. Any admission made by a party under this Rule is for the purpose of the pending action only and is not an admission by him for any other purpose, nor may it be used against him in any other proceeding.

Restatement of Judgments

Section 68

* * *

(i) Judgment by confession. Where no issues are litigated between the parties, but the defendant confesses judgment, the judgment is not binding on the parties in subsequent actions based on a different cause of action. This is true whether the defendant confessed judgment after the action was brought or gave a power of attorney to confess judgment before the action was brought.

Opposition

Office - Supreme Court, U.S.
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No. 81-615

In the Supreme Court of the United States

OCTOBER TERM, 1981

PAUL F. GRAY, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-615

PAUL F. GRAY, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner sought to vacate, through a writ of error coram nobis, the judgment of conviction entered by the district court on his plea of guilty to three counts of attempted income tax evasion, claiming that he had not been adequately warned that he would be estopped by those convictions from contesting fraud penalties asserted against him by the Commissioner of Internal Revenue in subsequent civil proceedings.

The relevant facts are as follows: On March 26, 1975, petitioner was indicted by a federal grand jury

on three counts of attempted income tax evasion for the years 1968, 1969 and 1970, in violation of 26 U.S.C. 7201 (A. 3-5).[1] He originally pleaded not guilty to all three counts. Petitioner's counsel, however, subsequently negotiated an agreement with the United States Attorney under which petitioner would plead guilty to each of the three counts of the indictment and the United States Attorney would recommend that petitioner be fined $6,000 and sentenced to a total of 18 months' imprisonment, only 100 days of which would be served in a jail-type institution. At the conclusion of the term of incarceration, he would be placed on probation for two years (Pet. App. 38-39). On May 6, 1975, petitioner was rearraigned, at which time he withdrew his prior plea and pleaded guilty to all three counts in accordance with the agreement reached with the United States Attorney.

On April 6, 1976, after petitioner had served his sentence and paid the fines, he received a statutory notice of deficiency from the Commissioner of Internal Revenue determining income tax deficiencies totalling $102,368.48 for the tax years 1968, 1969 and 1970. The notice also asserted fraud penalties under Section 6653(b) of the Internal Revenue Code of 1954, amounting to $51,174.23 for the three years. Petitioner sought a redetermination of the deficiencies and penalties in the Tax Court. In the course of that proceeding, the Tax Court held that petitioner was collaterally estopped, by virtue of his prior conviction of attempted income tax evasion for the years in question, from contesting the applicability of the fraud penalty to those years. See *Gray* v. *Commissioner*, Tax Ct. Mem. Dec. (P-H) para. 81,001

[1] "A." refers to the separately bound record appendix filed by petitioner in the court of appeals.

(Jan. 5, 1981), appeal pending, No. 81-1389 (6th Cir.).

Petitioner thereupon initiated this action by filing a motion for a writ of error coram nobis in the United States District Court for the Eastern District of Tennessee seeking to withdraw his guilty plea and to vacate the judgment of conviction (Pet. App. 44-52). The district court denied that motion and the court of appeals affirmed (*id.* at 36-43).

1. The decision below correctly rejected petitioner's attempt to have his convictions set aside. As this Court has explained, a collateral attack on a judgment of conviction through a writ of coram nobis is an "extraordinary remedy", and such relief should be granted only when necessary to correct errors " 'of the most fundamental character.' " *United States* v. *Morgan*, 346 U.S. 502, 511-512 (1954). There has been no such error committed in this case. The essence of petitioner's claim appears to be that his guilty plea was not made voluntarily and knowingly because he was not advised of the possible collateral estoppel effect of the plea in subsequent civil tax proceedings. See *Brady* v. *United States*, 397 U.S. 742, 748-750 (1970); *McCarthy* v. *United States*, 394 U.S. 459, 465-466 (1969). Petitioner, who was represented by counsel, was fairly apprised of the nature of the charges against him and the direct consequences of a guilty plea, however, and the district court was not required to advise him of the possible collateral estoppel effect of the plea in subsequent civil tax proceedings before accepting his plea.

At the rearraignment hearing at which he entered his guilty pleas, the court questioned petitioner on his understanding of the charges against him and obtained his unequivocal assurance that he had in-

deed committed the specific crimes charged (A. 9-11).[2] The court then had the government attorney recite the terms of the proposed plea agreement and was advised by petitioner that the terms so related were in accordance with his understanding of the agreement (A. 11-14). The court further advised petitioner of the maximum penalties for the crimes charged and obtained from government counsel a summary of the evidence of petitioner's guilt, to which petitioner offered no corrections or additions although given full opportunity to do so (A. 16-19). Finally, the court explained to petitioner that he had a right to be tried by a jury, to confront and cross-examine adverse witnesses, and to produce his own evidence, all of which would be waived by entry of a guilty plea (A. 16-19). Petitioner advised the court that he understood the matters discussed and wished to plead guilty.

Petitioner contends, nevertheless, that he should now be allowed to withdraw his plea because he was not warned that a judgment of conviction entered on the guilty plea would preclude him from contesting civil fraud penalties asserted by the Commissioner in a subsequent civil proceeding to collect the taxes owed for the prosecution years. This kind of collateral civil consequence of a guilty plea is properly relegated to the duty of counsel to advise a client, and petitioner was represented by counsel when he elected to plead guilty. A court that accepts a guilty plea, on the other hand, has no duty to advise the defendant of every possible adverse consequence of such a plea. Such a requirement clearly would "impose an

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[2] Petitioner's present protestation (Pet. 15-17) that he is innocent of the crimes charged is directly contradicted by his representation to the district court.

unmanageable burden on the trial judge and 'only sow the seeds for later collateral attack.'" *Fruchtman* v. *Kenton*, 531 F.2d 946, 949 (9th Cir.), cert. denied, 429 U.S. 895 (1976).

It has, therefore, been held that a defendant need not be advised of such "collateral," albeit significant, consequences of a judgment entered on a guilty plea as the effect of the judgment on civil commitment proceedings (*Cuthrell* v. *Director, Patuxent Institution*, 475 F.2d 1364 (4th Cir.), cert. denied, 414 U.S. 1005 (1973)); loss of good time credit (*Hutchison* v. *United States*, 450 F.2d 930 (10th Cir. 1971)); loss of right to vote and travel abroad (*Meaton* v. *United States*, 328 F.2d 379 (5th Cir. 1964), cert. denied, 380 U.S. 916 (1965)); and possible deportation (*Fruchtman* v. *Kenton*, *supra*, 531 F.2d at 948-949), because those matters bear not on the sentence imposed by the court accepting the plea but rather on actions "of another agency over which the trial judge has no control and for which he has no responsibility." *Michel* v. *United States*, 507 F.2d 461, 465 (2d Cir. 1974); *Fruchtman* v. *Kenton*, *supra*, 531 F.2d at 949. See also, *United States* v. *Cariola*, 323 F.2d 180, 186 (3d Cir. 1963). The collateral estoppel effect of a judgment of conviction entered on a plea of guilty to charges of attempted tax evasion is such a "collateral" consequence. *United States* v. *Miss Smart Frocks, Inc.*, 279 F. Supp. 295 (S.D.N.Y.), aff'd, 400 F.2d 56 (2d Cir. 1968), cert. denied, 394 U.S. 1013 (1969). See also *United States* v. *Parrino*, 212 F.2d 919, 922 (2d Cir.), cert. denied, 348 U.S. 840 (1954). Hence, there was no duty upon the district court to warn petitioner of the possible collateral estoppel effect of his plea.[3]

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[3] Petitioner also suggests (Pet. 17-22) that it is unjust to apply the doctrine of collateral estoppel to bar a defendant

2. Petitioner further claims (Pet. 26-30) that a statement made by the government attorney at the rearraignment hearing regarding the effect of the guilty plea on subsequent civil tax proceedings requires that the conviction be vacated. At the end of his recitation of the terms of the plea agreement, the government attorney made the following comment (A. 15):

> In addition * * * I should have stated for the Court's elucidation that Mr. Gray should have been advised through his attorneys, and I am sure he was likewise, that the matters that we are attempting to reach a disposition of is the criminal case alone, it makes no disposition of the civil tax liability of Mr. Gray and he should understand that.

It is clear that, as the district court found, "the United States Attorney's statement was merely a gratuitous warning that the criminal proceeding did not purport to involve the separate issue of civil liability" (Pet. App. 42). Petitioner's present assertion that the statement constituted a representation

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who pleads guilty to charges of tax evasion from contesting fraud penalties asserted in subsequent civil proceedings. The question of the propriety of the application of collateral estoppel, however, is irrelevant to the issue here presented, *i.e.*, whether petitioner voluntarily and knowingly entered his guilty plea. Rather, that issue should be raised and resolved in the context of the proceedings in which the collateral estoppel doctrine is invoked. In fact, petitioner challenged in the Tax Court proceedings, and in his appeal from the decision entered in that case, the application of the collateral estoppel doctrine in the tax case. See *Gray* v. *Commissioner*, Tax Ct. Mem. Dec. (P-H) para. 81,001 (Jan. 5, 1981), appeal pending, No. 81-1389 (6th Cir.). Hence, that issue will be decided in those proceedings.

that the guilty plea would not have any effect in subsequent civil proceedings is simply not reasonable in the circumstances.

It is, therefore, respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

DECEMBER 1981

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